STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
KENNETH M. FOSTER,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2005SF0565
	)	EEOC NO(S): 21BA43050
and	)	ALS NO(S): S06-195
	)	
CARTER, BROS. LUMBER CO., INC.,	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8b-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION) Entered this 23rd day of August 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS

HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
KENNETH M. FOSTER,	)	
	)	
Complainant,	)	CHARGE NO: 2005SF0565
	)	EEOC NO: 21BA43050
and	)	ALS NO: S06-195
	)	
CARTER BROS. LUMBER CO., INC.,	)	
	)	
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter is ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A public hearing was held before me in Springfield on September 12, 2007. The parties have filed their post-hearing briefs. Accordingly, this matter is ripe for a decision.

Contentions of the Parties

Complainant contends that he was the victim of racial harassment when certain co-workers subjected him to racial pamphlets, epithets and/or jokes, destroyed his lunch box, displayed a hangman's noose and subjected him other physical incidents of humiliation on account of his race. Complainant also asserted that members of Respondent's management made racial statements in his presence, and that Respondent failed to take any corrective action with respect to the racial harassment committed by his co-workers. Respondent, however, contends that Complainant is not credible with respect to many of his claims of racial harassment. It alternatively asserts that Complainant failed to report the alleged incidents of harassment committed by his co-workers so as to trigger any liability on the part of Respondent.

Findings of Fact

Based on the record in this matter, I make the following findings of fact:

1. On September 2, 2003, Complainant began work at Respondent's lumber yard assembling doors. At all times pertinent to the instant Complaint, Respondent's business consisted of supplying lumber, paint, hardware and general building materials for both commercial and residential projects.

2. Complainant was hired by Joe Carter, one of Respondent's owners, after personally meeting with him. At the time of his hire, Complainant was the only African-American in an otherwise all Caucasian workforce at Respondent.

3. From September 2, 2003 to some point in March of 2004, Complainant performed his duties in the door shop assembly area of the workplace without a significant incident.

4. In March of 2004, Complainant came into work and began performing clean-up duties in the door shop that included chopping wood on the miter box saw. At all times pertinent to the instant case, Complainant shared these duties with others in the door shop. While he was chopping wood, Complainant noticed a blank piece of paper lying near the miter box saw. When he flipped the piece of paper over, Complainant noticed a blank application for membership in the Ku Klux Klan. At the time of the incident, Complainant did not complain to Dave Cooper, Complainant's supervisor in the door shop, about the existence of the application or the circumstances of how Complainant came across the application.

5. In March of 2004, Lee Nevill, one of Complainant's co-workers, used the term "nigger" to describe an African-American in a joke he was telling Complainant. Complainant told Nevill that the joke was offensive to him, and he asked Nevill to stop. When Cooper arrived in the area, Nevill repeated the joke. Complainant again asked Nevill to stop and complained to Cooper about the joke. Cooper told Complainant that he did not have to accept jokes like that. The record is silent as to what, if any, discipline was imposed on Nevill as a result of this incident, or whether Nevill subsequently told any other jokes using the "nigger" term.

6. At all times pertinent to the instant Complaint, Respondent experienced a problem with an unknown worker tampering with employees' lunch boxes in the door shop. Throughout Complainant's tenure, someone in Respondent's management would periodically make a general announcement to all employees to leave alone the lunch boxes. By May of 2004, Complainant had been the victim on one occasion of having his lunch box altered by an unknown worker. By that time, some of Complainant's Caucasian co-workers in the door shop also had their lunch boxes altered by an unknown worker.

7. In May of 2004, Complainant discovered that someone had gone into his lunch box a second time and poured a foreign yellowish liquid on his food. Complainant reported the incident to Cooper, who told Complainant that he could not do anything about the lunch box incident if he could not identify the culprit.

8. After speaking to Cooper about the lunch box incident referred to in Finding of Fact No. 7, Complainant went to Kathy Seebold, Respondent's office administrator, to complain about the incident. Seebold conducted an investigation, but could not identify the culprit.

9. In May of 2004, Complainant was transferred from the door shop to the lumberyard based upon a perception by Seebold and Carter that Complainant did not get along well with his co-workers in the door shop. When Complainant was transferred to the lumberyard, Greg Vanderfelts took over Complainant's position in the door shop.

10. In June or early July, 2004, Complainant and Vanderfelts engaged in a verbal altercation that escalated to the point where Vanderfelts picked up some nearby banding/strap material that had been used to tie ten pieces of molding together and shook the banding/strap material at Complainant. The banding/strap material had a circumference that approximated a large shoe string.

11. At some point during Complainant's altercation with Vanderfelts, Complainant left the scene and went into Seebold's office to report that he and Vanderfelts had engaged in a verbal altercation, and that Vanderfelts had held up a "towrope" and shook it at him. Seebold

instructed Complainant to stay in her office while she investigated the incident. Complainant did not state to Seebold either that Vanderfelts had called him a "nigger" during the incident or that the "towrope" was in fact an actual rope that had been tied into a four-to-five-foot noose.

12. After speaking to Complainant about the "towrope" incident, Seebold left her office and spoke to Vanderfelts to get his side of the incident. Vanderfelts told Seebold that he and Complainant had engaged in an argument, and that at the time of the argument he had in his hand the banding/strap material. The banding material was not a rope and did not contain a hangman's noose at the end of it. Seebold also spoke to an unnamed employee about the incident.

13. At the conclusion of her investigation, Seebold came to the conclusion that a personal animosity had arisen between Complainant and Vanderfelts arising out of the fact that Vanderfelts had taken over Complainant's position in the door shop. Seebold did not discipline either Complainant or Vanderfelts over the incident and did not perceive that Complainant was making a claim of racial harassment.

14. On July 15, 2004, Seebold placed in Complainant's file a written warning for Complainant to stay out of the door shop. According to the written warning: (1) someone had entered the door shop and had dumped an employee's lunch box and stolen the employee's diabetes medication; (2) Complainant had been previously told by Anthony Rottinghaus, another part-owner of Respondent, not to enter the door shop at any time because there had been some problems in that area; (3) on July 15, 2004, Cooper had noticed Complainant entering the door shop and told him not to go in there; and (4) a verbal altercation arose between Complainant and Cooper, in which Complainant told Cooper that he was going to punch him in the mouth.

15. While the record is not clear whether the lunch box at issue in Complainant's July 15, 2004 written warning was Cooper's lunch box, Cooper's lunch box had been tampered with (and his diabetic medicine had been stolen from the lunch box) while Complainant was employed at Respondent. Complainant was aware of the incident involving Cooper's lunch box

and was aware of Respondent's policy, which provided that only door shop employees could be in the door shop. Respondent's policy covered all of its employees and was issued in an attempt to curb the lunch box vandalism problem.

16. On August 6, 2004, Seebold received a report from Vanderfelts that Complainant had attempted to start a fight. Later in the day, Seebold received a report from Allen Schroll that Complainant had become angry after Schroll had attempted to instruct him on how to drive the forklift. Schroll also told Seebold that he and Complainant had engaged in an altercation that resulted in Complainant punching him in the mouth and choking him. Seebold's report of the incident also indicated that Complainant had eventually left the worksite.

17. At all times pertinent to the instant Complaint, Complainant's Caucasian co-workers would infrequently refer to each other as a "nigger" in a joking fashion.

18. At some point in Complainant's tenure at Respondent, Complainant came across a Ku Klux Klan solicitation letter, which began with the phrase: "Racialist Greetings White Patriot." The letter identified the purpose of the Klan, referred to enclosed literature, set forth its annual dues and encouraged individuals to consider membership in the Klan.

19. On August 24, 2004, Complainant filed a Charge of Discrimination alleging that: (1) he was the victim of racial harassment committed by co-workers Randy Lauterbach, Nevill and Vanderfelts, and that Cooper supported the racial hostility in the workplace; (2) he was the victim of race discrimination and unlawful retaliation when Respondent transferred him to the lumberyard in May of 2004; (3) he was the victim of race discrimination and unlawful retaliation when Respondent denied him a pay raise in May of 2004; (4) he was the victim of race discrimination and unlawful retaliation when Respondent terminated him from his lumberyard position in August of 2004.

20. On June 1, 2005, the Department of Human Rights dismissed Complainant's Charge of Discrimination in its entirety after finding a lack of substantial evidence as to each

claim. After Complainant filed a Request for Review, the Department made a finding of substantial evidence only as to Complainant's racial harassment claim.

Conclusions of Law

1. Complainant is an "employee" as that term is defined under the Human Rights Act.

2. Respondent is an "employer" as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.

3. Complainant failed to establish a *prima facie* case of racial harassment with respect to conduct taken by Respondent's management or its employees towards him, or with respect to any alleged failure by Respondent to take reasonable corrective measures to address Complainant's claims of racial harassment committed by his co-workers.

Determination

Complainant has failed to show by a preponderance of the evidence that Respondent harassed him on account of his race in violation of Section 2-102(A) of the Human Rights Act (775 ILCS 5/2-102(A)).

Discussion

Preliminary matter.

During the public hearing, Respondent contended that Complainant brought the instant claim against it in bad faith, and that the allegations against it were untrue based on Complainant's extensive history of filing unsubstantiated discrimination claims against his prior employers. In support of this contention, Respondent introduced via an offer of proof evidence demonstrating that within the last six years Complainant had lodged six race discrimination charges against six different employers, and that Complainant received a cash settlement in five of those charges, while the sixth charge was voluntarily dismissed. Respondent also submitted via a separate offer of proof that Complainant had told Cooper at the beginning of his

employment that he had a book on how to sue employers. Complainant's relevancy objections as to both pieces of evidence, though, were sustained.

In its brief, Respondent cited to *Baasch v. Reyer*, 827 F.Supp. 940 (E.D. NY. 1993)) to support its claim that such evidence was admissible to establish both Complainant's credibility and his bad faith motive in prosecuting the instant case. A careful review of the *Baasch* case, though, does not support Respondent's argument in this regard. In *Baasch,* plaintiff filed a §1983 civil rights action against his arresting officers after the criminal charges that led to the arrest were dismissed upon a finding of a speedy trial violation. There, the defendants were allowed to introduce evidence of other complaints filed by plaintiff against other arresting officers or civilian complaining witnesses, and the court found that such evidence was admissible to show plaintiff's motive in filing the §1983 lawsuit after observing that plaintiff "employ[ed] this tactic [of filing counter-complaints] whenever he had a run-in with the law." 827 F.Supp. at 943.

While Respondent maintains that a similar ruling should apply in the instant case given Complainant's history of filing six race discrimination charges against six prior employers, the holding in *Baasch* is distinguishable since: (1) the *Baasch* court noted that the prior filings by the plaintiff had been "frivolous" criminal cross complaints (827 F. Supp. at 943); and (2) the record in the instant matter is otherwise silent as to the relative merits of any of the six prior claims of race discrimination lodged by Complainant, the amounts sought by Complainant in comparison to the amounts received, or the actual number of employers Complainant worked for in the relevant time period so as to make any finding as to whether Complainant's prior claims were frivolous. To be sure, Complainant did not obtain an acknowledgment of discrimination with respect to any of his settled cases. Yet, such findings are rarely included in settlement documents since parties, particularly employers, typically avoid any acknowledgement of discrimination when making payments to their settling counterparts. Moreover, the fact that Complainant had received a monetary settlement in five of the six prior race discrimination claims cuts against a finding that said claims were necessarily frivolous. Thus, I will again

sustain the objections made by Complainant to this evidence, although, as noted below, I did find for unrelated reasons that Complainant was not credible as to certain components of his racial harassment claim.

The merits.

The Human Rights Act provides that an employer has a duty to afford all employees equal terms and conditions of employment. Among those terms is that an employer must provide a work environment free of racial harassment, ridicule and disrespect. *Smith and Cook County Sheriff's Office*, 19 Ill. HRC Rep. 131, 135 (1985). Harassment has been defined by the Commission as any form of behavior which makes the working environment so hostile and abusive that it constitutes a different term and condition of employment based on a discriminatory factor. (See, *Robinson and Jewel Food Stores*, 29 Ill. HRC Rep. 198 (1986).) Moreover, because racial harassment is a *per se* violation of the Act (see, *Helm and Busing's McDonald's*, IHRC, ALS No. 5097(S), August 12, 1992), "an employer may not stand by and allow an employee to be subjected to a course of racial harassment by co-workers [and] must accept responsibility for its supervisors' derelictions in responding to racial problems." *Village of Bellwood Board of Fire and Police Commissioners v. Human Rights Commission*, 184 Ill.App.3d 339, 541 N.E.2d 1248, 1256, 133 Ill.Dec. 810, 818 (1St Dist. 3rd Div. 1989).

A hostile work environment, for purposes of a racial harassment claim, is an environment in which a complainant is subjected to egregious racially motivated conduct in the workplace, or, an environment in which a complainant was subjected to a pattern of racially motivated incidents, such as racial slurs, in the workplace. (*See,* for example, *Smith and Cook County Sheriff's Office*, 19 Ill. HRC Rep. 131 (1985), where the Commission found that a supervisor's constant use of the terms "nigger" and "spook" established a viable claim of racial harassment.) Here, too, Complainant contended that he was the victim of racial harassment in the workplace where one co-worker on a daily basis and other co-workers on a sporadic basis allegedly called him a "nigger," while one of Respondent's owners (i.e., Joe Carter) allegedly

made a crude racial joke about the darkness of his skin, and another supervisor (i.e., Kathy Seebold) allegedly used the term "spook" on one occasion in his presence. He also asserted that co-workers subjected him to a series of physical insults based on his race that included one co-worker shaking a rope that had been tied in a four-to-five-foot noose, calling him a "nigger" and telling him that the noose was for him. In this regard, I would agree with Complainant that if his allegations are true, he has alleged enough to state a viable claim of racial harassment.

The problem for Complainant, though, is that I did not believe that he was telling the truth with regard to many of his most serious allegations of harassment. For example, Complainant asserted that he was the of victim racial harassment when a co-worker named Randy Lauterbach dumped a water cooler bottle on him, which, according to Complainant, almost precipitated a fight. However, I doubt that the incident ever occurred since Complainant had failed to mention the alleged incident in his answers to Respondent's interrogatories or include it in the Complaint or prehearing memorandum. Inasmuch as Complainant included much less serious incidents of alleged racial harassment in his responses to Respondent's Interrogatories, as well as the Complaint and prehearing memorandum, I doubt that Complainant simply forgot to mention it prior to the public hearing.

Similarly, Complainant claimed in his Complaint and in his prehearing memorandum that he was subjected to racial harassment when Lauterbach and two other co-workers Greg Vanderfelts and Allen Schroll used the term "nigger" in his presence several times each day over a period of several months. Complainant, though, significantly backtracked from this assertion by claiming at the public hearing that only Lauterbach had used the term on a daily basis, while acknowledging that Vanderfelts may have used the "nigger" term "at times" every other day. Indeed, Complainant made no claim at the public hearing that Schroll had ever used the term. Moreover, although Complainant asserted that he complained about Lauterbach's alleged use of the "nigger" term to Tommy Johnson, a supervisor in the lumberyard, neither party called Tommy Johnson to the witness stand to either corroborate or refute Complainant's

testimony in this regard. Additionally, since the record shows that Complainant did go over his supervisor's head on other occasions to seek out upper management when he had complaints about his working conditions, I find it odd that Complainant did not claim at the public hearing that he ever told Seebold or any other person in higher management about Lauterbach's alleged daily use of the "nigger" term if in fact it actually happened. Accordingly, I did not find that Complainant was credible with respect to his claim that Lauterbach was calling him a "nigger" on a daily basis.

The same result applies to Complainant's claim that Vanderfelts used the "nigger" term "at times" on an every-other-day basis. Specifically, while Complainant testified that he told Rottinghaus about Vanderfelts' use of the "nigger" term "once he [Rottinghaus] came on board as an owner" (Tr. at p. 11), the record shows that Rottinghaus became an owner of Respondent in October of 2003. However, Complainant also indicated that he had enjoyed a good "camaraderie" with his co-workers at the workplace during that same time period, and that Respondent's business was a place where he "would love to stay" during the September 2003 to February 2004 time period. (Tr. at p. 27.) Thus, I did not find Complainant's accusations against Vanderfelts believable since, if Complainant had been experiencing a barrage of "nigger" epithets from Vanderfelts prior to, and including October of 2003, when Rottinghaus came on board, it is odd for Complainant to state that Respondent was also a good place to work.[1]

More important, Harold "Steven" Taylor, an individual who was called as a witness by Complainant and who worked with Complainant in the door shop, did not provide any testimony supportive of Complainant's contention that he was the target of racial epithets in the workplace. Instead, Taylor could only recall that the term "nigger" was used infrequently in a joking fashion

[1] Complainant also stated that the first time he made any kind of racial harassment complaint to Seebold was in May of 2004 (Tr. pg. 19-20), and thus I doubt whether Complainant was making any kind of complaints to Rottinghaus or Seebold about Vanderfelts' conduct during the first six months of his employment with Complainant.

by Caucasian co-workers among other Caucasian co-workers during an unspecified timeframe. While I agree that use of such a term is offensive to African-Americans regardless of the context or circumstances of its use, I am unsure whether Complainant can use this testimony to support any racial harassment claim where: (1) Complainant never testified that he similarly witnessed his Caucasian co-workers use the "nigger" term amongst themselves; and (2) Taylor could not give a timeframe for such a use or specifically state that Complainant was ever present during these alleged infrequent exchanges between Caucasian co-workers.

Complainant also claimed that he was the victim of a racial harassment when Vanderfelts held up a rope that had been tied into a four-to-five-foot hangman's noose and called out: "hey nigger, this here is for you." Complainant further testified that although other unspecified individuals had witnessed the incident, Seebold made no independent investigation of his complaint and did not discipline Vanderfelts for his offensive conduct. Complainant also asserted that he was moved to a less desirable job in the lumberyard from his door shop position two days after the incident because he had complained about the alleged noose incident and other "ongoing incidents" to Seebold. (Tr. at pg. 32.) Although allegations that Complainant was shown a hangman's noose and called a "nigger" by a co-worker certainly qualify as severe allegations of racial harassment, I did not find Complainant credible with respect to these allegations.

Initially, it should be noted that Complainant was inconsistent with respect to the details of the alleged incident given his testimony that the alleged occurrence took place both before and after his transfer to the lumber yard. (Compare Tr. at pgs 26, 28 (incident took place after his transfer) with Tr. at pg. 32 (incident took place prior to his transfer).) He also claimed at the public hearing that he went into Seebold's office to report the incident immediately after it had occurred (Tr. at pgs 29-30), while the allegations in the Complaint indicate that Complainant waited approximately two months later to report the incident to Seebold. Indeed, to the extent that Complainant has attempted to inject a retaliation claim by adamantly insisting that his

transfer to the lumberyard occurred only two days after his report of the noose incident, I note that the Department of Human Rights found a lack of substantial evidence with respect to his similar claim that he had been "demoted" to the lumberyard position in May of 2004 because of his prior opposition to unlawful discrimination.

Respondent, though, does not contest that something occurred between Complainant and Vanderfelts after Complainant's transfer to the lumberyard, and Seebold recalled an incident in which Complainant had come into her office and complained that Vanderfelts had held up a "towrope" and shook it at him during a verbal altercation. However, Seebold additionally testified that she actually investigated the incident by immediately speaking to Vanderfelts and an unnamed co-worker and learned that Vanderfelts and Complainant were having a verbal argument during which Vanderfelts held up some banding materials. The banding materials, though, resembled a large shoestring used to tie ten pieces of molding together, rather than a large rope. Moreover, Seebold stated that: (1) no one had claimed that Vanderfelts had held a traditional "rope" during the incident, let alone, a rope that had been tied into a hangman's noose; (2) there was nothing that either Complainant or Vanderfelts had told her to indicate that racial epithets or a racial incident, as opposed to a verbal altercation, had occurred between the two workers; and (3) she imposed no discipline on either individual where both men had been engaged in an altercation and where she believed that Complainant had held an animosity towards Vanderfelts on account of the fact that Vanderfelts had taken over Complainant's job in the door shop.

While the record contains a major conflict as to whether Seebold had actually investigated the incident, I found Seebold to be credible in this regard given the evidence that Seebold conducted other investigations of serious conflicts between Complainant and his co-workers that are contained in the record. Moreover, although Complainant counsel argues that such evidence is not persuasive on the issue of Seebold's credibility since the other incidents were not racial in nature, Complainant's counsel has not otherwise explained the

inconsistencies in Complainant's testimony with regard to this incident. Here, it is enough to say that I found Seebold more believable with respect to her claim that: (1) she actually investigated the "towrope" matter by obtaining statements from Complainant, Vanderfelts and an unnamed third party; and (2) during her investigation, she never uncovered any information from anyone that would indicate to her that the incident was racial in nature. As such, I find that Complainant was not believable in his contention that Vanderfelts called him a "nigger" and threatened him with a hangman's noose, or that he made such a claim to Seebold.

Parenthetically, even if Complainant had reported the hangman's noose incident to Seebold, I doubt that Complainant could prevail under the Human Rights Act in the absence of any requirement that would mandate that Seebold, when conducting her investigation, accept his version of the facts over the version given by Vanderfelts. The Commission addressed a similar issue, albeit in the context of a sexual harassment claim, in *Fritz and State of Illinois, Department of Corrections*, IHRC, ALS No. 4718(S), October 17, 1995. There, the complainant had accused a co-worker of grabbing her breast, while the co-worker denied that the incident had occurred. The employer, after conducting an investigation into the matter, eventually found no basis for the accusation and imposed no discipline on the alleged harasser. While the complainant argued that, in spite of the employer's findings, she nevertheless was subjected to sexual harassment, and that her employer was liable for the conduct of her co-worker, the Commission held that the employer could not be responsible for any harassment committed by the co-worker where it took prompt investigation designed to uncover the facts of the dispute and reasonably concluded from the gathered information that the sexual harassment had not occurred. *Fritz*, slip op. at 4.

Moreover, the same result applies even if an administrative law judge later finds that, based on evidence generated at the public hearing, the incident actually occurred. (See, for example, *Schmitt and Adams County Highway Dept.*, IHRC, ALS No. S-8879, January 13, 1998.) To be sure, the *Fritz/Schmitt* analogy depends on a finding that Seebold actually

conducted a fair investigation into Complainant's allegations against Vanderfelts. However, as noted above, I found Seebold credible when she testified that she actually spoke to Complainant, Vanderfelts and another employee about the altercation and did not uncover a racial component to the incident, let alone the existence of a four-to-five-foot hangman's noose in the workplace. As such, our Respondent "had not become aware of" racial harassment for purposes of imposing liability on an employer, even if Complainant had reported such an incident, since Seebold could reasonably have concluded that no racial incident occurred based on the results of her investigation.

That having been said, I did not find Complainant completely incredible with respect to other claims of harassment committed by his co-workers. For example, I found Complainant credible when he asserted that a co-worker Lee Nevill used the term "nigger" in March of 2004 when describing a character in a joke he was telling to Complainant, and that he objected to Nevill regarding the use the term. Complainant also credibly testified that he complained to Cooper when Nevill began telling the same joke to Cooper, and that Cooper responded by telling him that he did not have to accept "stuff like that." (Tr. at pg. 17.) While the record is silent as to whether Cooper separately disciplined Nevill for using the "nigger" term in the workplace outside of voicing support for Complainant's objection, Complainant did not further testify that Nevill repeated the subject joke or any other racial jokes in the workplace subsequent to Complainant's complaint about the joke to Cooper.

Additionally, I found that Complainant credible in his claim that his lunch box had been vandalized on two occasions. However, the record did not support Complainant's claim that said vandalism constituted a racial act where Complainant's Caucasian supervisor (Cooper) and others also had his/their lunch box(es) vandalized, and where Seebold and Cooper credibly testified that lunch box vandalism was a common problem in the workplace that affected

Complainant's Caucasian co-workers as well.[2] In a related matter, Complainant also asserted that Cooper had threatened to beat him in front of Seebold after Complainant had gone to her to complain about a second instance of his lunch box being vandalized. I did not find Complainant credible, though, with respect to this aspect of Complainant's lunch box vandalism claim, although Seebold's report of her investigation into a July 15, 2004 incident involving Cooper and Complainant suggests that Cooper and Complainant had been involved in an incident concerning the threat of physical violence, albeit with Complainant threatening to punch Cooper in the mouth after Cooper had told Complainant to stay out of the door shop.

I also found Complainant credible in his testimony that he found a Ku Klux Klan application in Respondent's workplace, but not under the circumstances to which he testified at the public hearing. Specifically, Complainant stated that: (1) he discovered "a piece of paper" lying face down next to a miter box saw and flipped the paper over to reveal the application after he had begun chopping wood; and (2) he took the application to Cooper, who, according to Complainant, looked at the application and gave the application back to Complainant. Cooper, though, denied that Complainant had ever presented him with the Klan application, and Complainant was unable to relate what Cooper had told him in response to the alleged tender of the application. (Tr. at pg. 13.) In this respect, I found Cooper believable since I found it odd that Complainant was unable to recall what Cooper said in response to the alleged tender of the document, especially when Complainant was able to recall other statements made by Cooper with respect to less serious offenses. Similarly, I find it unlikely that Cooper would have given the application back to Complainant, as opposed to either retaining it or destroying the document, especially where Cooper had previously given verbal support to Complainant's objection to Nevill's racial joke. As such, while I believe that Complainant did find the Klan

[2] While Complainant asserted that he had "never heard" of other employees having their lunch box vandalized (Tr. at pg. 20), I found Cooper and Seebold more believable that Complainant had been aware of others in the workplace being victims of lunch box vandalism. I also note that a lunch box vandalism regarding another employee was one of the topics mentioned in the July 15, 2004 warning placed in Complainant's file.

application in the workplace[3], I do not believe that Complainant ever tendered the application to Cooper.

The same result applies to the "Racial Greetings White Patriot" letter Complainant maintained he also saw and showed to Cooper in the workplace. Initially, while I note that Complainant consistently referred in his testimony to finding "a piece of paper" (Tr. at pg. 13-14) near the miter saw box and showing that piece of paper (i.e., the application) to Cooper, Complainant has not otherwise explained how, when or where the separate Klan letter was obtained. Moreover, although Complainant similarly testified that he showed the Klan letter to Cooper, and that Cooper just "kind of shrugged it off" (Tr. at pg. 14), I again do not believe Cooper would have given such a reaction where he had voiced support of Complainant when he had previously complained about Nevill's joke. As such and like the Klan application, I did not find Complainant credible in his assertion that he showed Cooper the Klan application or the cover letter so as to give Respondent's management notice of their existence in the workplace.

Other allegations of racial harassment.

Complainant testified that: (1) on one occasion, Seebold used the term "spook" in front of him, and that he believed her use of the word was racial; (2) Joe Carter made a racial joke/comment about the darkness of Complainant's skin; and (3) someone at the workplace spit into his coffee on account of Complainant's race. However, I did not find Complainant believable since both Carter and Seebold denied Complainant's accusations of harassment against them, and since Complainant failed to mention in either the Complaint, his Charge of Discrimination, or his prehearing memorandum as a contested fact either Seebold's or Carter's alleged statements. Moreover, as to the alleged coffee cup incident, Complainant did not

[3] Admittedly, the issue of whether Complainant found the application and Klan letter in the workplace is a close call, especially where the record does not present any other viable basis for Complainant coming into possession of both documents. However, I found Taylor's testimony indicating Caucasian co-workers would infrequently use the "nigger" term among themselves, as well as Complainant's credible testimony regarding the existence of Neville's joke as enough evidence to tip the balance in favor of crediting Complainant's testimony that he found both documents at the workplace.

present any evidence to corroborate that the incident had actually occurred, or that a member of management had become aware of the incident. Indeed, Complainant's candid acknowledgement (Tr. at pg. 62) that he did not complain to management about every single incident of alleged harassment does not help his racial harassment claim to the extent that his claim is based on conduct committed by his co-workers. See, *Village of Bellwood Board of Fire and Police Commissioners v. Human Rights Commission*, 184 Ill.App.3d 339, 541 N.E.2d 1248, 1255, 133 Ill.Dec. 810, 817 (1st Dist., 3rd Div. 1989) for the proposition that an employer is not strictly liable for racial harassment committed by non-managers/non-supervisors.

Accordingly, because of the credibility determinations made above, I find that Complainant, at most, was able to prove at the public hearing that: (1) Lee Nevill told him a joke that contained the term "nigger;" (2) he found a Ku Klux Klan application and cover letter in the workplace; (3) someone vandalized his lunch box; and (4) some of Complainant's Caucasian co-workers may have occasionally called each other "nigger" in his presence. However, as the *Village of Bellwood* court observed, Complainant is required to show more than a few isolated incidents of harassment in order to establish a racial harassment claim. (*Village of Bellwood*, 541 N.E.2d at 1255, 133 Ill.Dec. at 817.) Indeed, racial comments that are either parts of casual conversation (i.e., Nevill's joke), or are accidental, or are sporadic (i.e., infrequent "nigger" comments made by Caucasian co-workers to each other) do not trigger civil rights protective measures under the Human Rights Act. (*Village of Bellwood*, Id.) Additionally, the lunch box incidents must be disregarded since Complainant failed to show a racial component to the harassment. Moreover, while I agree with Complainant that Ku Klux Klan applications forms and cover letters have no place in the workplace, Complainant has failed to establish Respondent's liability for the presence of said literature in the workplace where: (1) there is no evidence in the record as to who was responsible for the placement of said literature in the workplace; (2) there is no credible evidence that anyone in Respondent's management was aware of said Klan materials and failed to take corrective measures to prevent similar materials from being in the

workplace in the future; and (3) there was no evidence that Complainant was subjected to a repeated instance of Klan materials being present in the workplace. Thus, for all of the above reasons, I find that Complainant has failed to establish a *prima facie* claim for racial harassment against Respondent.

Recommendation

For all of the above reasons, it is recommended that the instant Complaint and the underlying Charge of Discrimination of Kenneth M. Foster be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 23RD DAY OF NOVEMBER, 2009